

RESPONSE

This Response is in reply to the Office Action mailed May 4, 2007 from the USPTO in the Application. In the Office Action, the Examiner requested an election of species under 35 U.S.C. § 121 of one of the following 6 alleged independent or distinct species for prosecution on the merits, to which the claims shall be restricted if no generic claim is finally held to be allowable:

1. A device, kit, method of collecting a target, method of sampling an area, method of lowering an amount of target, method for cultivation of a microorganism, comprising a swab comprising a swab consisting essentially of gelatine.

2. A device, kit, method of collecting a target, method of sampling an area, method of lowering an amount of target, method for cultivation of a microorganism, comprising a swab comprising a swab comprising a gelatine-based sponge.

3. A device, kit, method of collecting a target, method of sampling an area, method of lowering an amount of target, method for cultivation of a microorganism, comprising a swab comprising a swab comprising microfibrillar gelatine.

4. A device, kit, method of collecting a target, method of sampling an area, method of lowering an amount of target, method for cultivation of a microorganism, comprising a swab comprising a swab consisting essentially of collagen.

5. A device, kit, method of collecting a target, method of sampling an area, method of lowering an amount of target, method for cultivation of a microorganism, comprising a swab comprising a swab comprising a collagen-based sponge.

6. A device, kit, method of collecting a target, method of sampling an area, method of lowering an amount of target, method for cultivation of a microorganism, comprising a swab comprising a swab comprising microfibrillar collagen.

Applicants respectfully traverse and request reconsideration and withdrawal of the species election. The Examiner cites 37 C.F.R. § 1.142(a) for the proposition that a restriction requirement may be made at any time before final action, but the Examiner has requested a Species Election. See Office Action, pp. 2-4. Species election is governed by 37 C.F.R. § 1.146, which states, "In the *first* action on an application containing a generic claim to a generic invention (genus) and claims to more than one patently distinct species embraced thereby, the examiner may require the applicant in the reply to that action to elect a species of his or her invention to which his or her claim will be restricted if no claim to the genus is found to be allowable" (emphasis added). In addition, M.P.E.P. § 808.01(a) states, "Election of species may be required *prior* to a search on the merits . . . (B) in applications containing both species claims and generic or Markush claims" (emphasis added).

A first action on the merits was previously mailed from the USPTO on October 6, 2006 in the Application and did not include an election of species. In addition, the Application contains species, generic, and Markush claims, which were present prior to the issuance of that Office Action. Therefore, a search on the merits has already been performed on the species, generic, and Markush claims of the Application.

M.P.E.P. § 808.01(a) further states, "A requirement for restriction is permissible if there is a patentable difference between the species as claimed and there would be a serious burden on the examiner if restriction is not required." The Examiner, however, has not asserted nor explained why there would be a serious burden placed on her if the restriction was not required. In fact as already discussed above, the Examiner has already performed a search and issued an Office Action on the merits. Therefore, the Examiner would not be seriously burdened if an election of species was not made.

Moreover, M.P.E.P. § 808.01 requires that the examiner provide particular reasons why the examiner finds that the inventions are independent or distinct. "A mere statement of conclusion is not adequate. The reasons upon which the conclusion is based should be given." In the present application, the Office Action merely stated, "The species are independent or distinct because they are not obvious variants of one another." See Office Action, p. 3. The Office Action did not provide any reasons for this conclusion.

Finally, 37 C.F.R. § 1.146 states that if an "application contains claims directed to more than a reasonable number of species, the examiner may require restriction of the claims to not more than a reasonable number of species before taking further action in the application." The six alleged species designated by the Examiner are not an unreasonable number, which is demonstrated by the fact that the Examiner has already examined the claims, as discussed above.

In view of the above remarks, Applicants respectfully request that the requirement for species election be withdrawn. In the event that the requirement is made final, and in order to comply with 37 C.F.R. § 1.143, Applicants provisionally elect Species 2, drawn to a device, kit, method of collecting a target, method of sampling an area, method of lowering an amount of target, method for cultivation of a microorganism, comprising a swab comprising a swab comprising a gelatine-based sponge. Claims 1, 83-116, 118-121, and 123-128 are readable on provisionally elected Species 2.

CONCLUSION

Applicants believe that a full and complete reply has been made to the outstanding Office Action and, as such, the present application is in condition for allowance. The Examiner is respectfully requested to contact the undersigned by telephone at the below listed telephone number in order to expedite resolution of any issues and to expedite passage of the present application to issue if any comments, questions, or suggestions arise in connection with the present application.

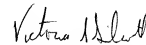
It is believed that no additional fees are due in connection with this Response. However, if the USPTO determines that a variance exists in the amount due and the amount authorized above, the Commissioner is hereby authorized to credit or debit any such variance to the undersigned's Deposit Account No. 50-0206.

Respectfully submitted,

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Dated: August 6, 2007

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